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Supreme Court of the United States

OCTOBER TERM, 1963

No. 447

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation and
ASHLO COAL COMPANY, *a corporation*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (called "UMW") prays that a writ of certiorari issue to review (1) the judgments and orders of the United States Court of Appeals for the Sixth Circuit,[1] entered in Case No. 14,832, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees,*[2] v. *United Mine Workers of America, Defendant-Appellant*, on February 16, 1963, wherein the Sixth Circuit affirmed a judgment entered by the United States District Court for the Eastern District of Kentucky (Jackson Division)[3] in its Case No. 284 on June 7, 1961 of $250,000.00

[1]Herein called "Sixth Circuit".

[2]Plaintiffs-Appellees are called "Sunfire" and "Ashlo", respectively. Collectively, they are called "Companies".

[3]Herein referred to as "trial court" or "district court".

in favor of Sunfire and $14,000.00 in favor of Ashlo, both with costs; and the district court's order dated June 27, 1961 and entered June 28, 1961 denying UMW's motion for judgment in accordance with motion for directed verdict or for a new trial, and (2) the Sixth Circuit's order of June 10, 1963 denying UMW's petition for re-hearing.[1]

A certified appendix record, together with the proceedings in the Sixth Circuit, is furnished herewith in accordance with the Rules of this Court.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A to this petition (pp. 1-5a); in the certified appendix record (Vol. II); and it is reported in 313 F. 2d 108. No written memorandum was handed down by the district court.

JURISDICTION

Judgments of the Sixth Circuit, of which complaint is made herein, were entered on February 16, 1963 and June 10, 1963.

This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

In their complaint, Companies alleged "The Court has jurisdiction . . . by virtue of . . . Section 303" of the Labor Management Relations Act, 1947, (herein called "Act"). [4a, 6a].

QUESTIONS PRESENTED

1. Where union members, at a union's direction, strike to obtain execution of a collective bargaining agreement

[1] Judgments and orders of both the Sixth Circuit and the district court in Case No. 14,832 appear in Appendix B hereto, pp. 6-7a.

by each of 176 coal companies, formerly contract signatories, in the same coal field area, and the operator-lessee of a coal tipple and the tipple's owner in the same area also refuse to sign such contract, as do coal producers selling their coal to the operator-lessee at a delivered price and truckers hauling coal to the tipple where the tipple operator processes and prepares it for interstate shipment and sale by the tipple owner, does picketing activity by striking tipple employees and others

(1) stationed at the entrance to the road which leads to the tipple, and directed at truckers or their employees; and

(2) stationed at switches on railroad tracks leading to the tipple, and directed at train crews placing and pulling cars to and from the tipple,

each, constitute secondary boycott conduct banned as activity within the scope of Section 303, Labor Management Relations Act, 1947, so as to be the basis for damage awards thereunder?

2. Is a jury verdict of union responsibility and money damage awards proper under Section 303, Labor-Management Relations Act, 1947, or for a common-law claim where, in interrogatories submitted by the trial court to the jury, the standard of union responsibility and damages alike is permitted to be based upon conduct of union members and is not made to depend upon union agency?

3. Where plaintiffs are awarded money judgments in an action against a labor union based upon a violation of Section 303, Labor-Management Relations Act, 1947, or for a common-law claim; and plaintiffs' proof includes evidence of dynamitings of their properties and the burning of a tipple during a strike, and admittedly there is no positive evidence of the fire's origin or who caused it or

the dynamitings and no evidence of an agency relationship between the tortfeasor and the labor union, (1) is evidence by other coal producers and tipple owners in the same coal field area, showing they suffered similar property damages both during and after the same strike, properly admissible, in the total absence of identification of the tortfeasor and of an agency relationship between such tortfeasor and the union; and (2) does such evidense warrant the jury inference therefrom that union agents damaged plaintiffs' properties so as to support the jury awards against the labor union?

4. (a) In an action for damages instituted under Section 303, Labor-Management Relations Act, 1947, by an employer against a labor union and there is joined with a claim under the statute a non-federal, common-law action for tort, did the trial court commit reversible error in submitting an interrogatory to the jury which imputed responsibility to the union for conduct of union members and which interrogatory was inconsistent with pleadings and without evidentiary support, and where neither the jury's charge nor the interrogatory apprised the jury of the elements essential to a finding that the statute had been violated, and the trial court refused instructions which would have so apprised the jury?

(b) Was the appellate court correct in refusing to consider the defendant's objections to the jury charge, the trial court's ruling on interrogatory 1 and the trial court's refusal to give instructions requested by the defendant union on the ground that it had not met the requirements of Rule 51, Federal Rules of Civil Procedure? and

(c) Even if the objections made by the defendant union did not meet Rule 51's requirements, was the trial

court under a duty correctly to instruct the jury in the furtherance and interest of justice?

5. Whether, under the evidence, the appellate court correctly appraised Sunfire Coal Company as a person who is permitted to maintain an action as a plaintiff under Section 303 of the Labor-Management Relations Act, 1947?

6. In an action instituted in a federal district court by an employer against an unincorporated labor union in its common name for damages and the district court's jurisdiction is asserted under Section 303, Labor-Management Relations Act, 1947, and there is no diversity of citizenship of the parties, (a) does the district court have jurisdiction, power and authority under the doctrine of pendent or ancillary jurisdiction to determine the issues in a non-federal tort action joined with a claim under said section, where state courts in the state in which the alleged wrongful conduct occurred and wherein the federal district court is sitting would not entertain jurisdiction of a suit based upon the non-federal claim against the union in its common name; and (b) does the doctrine of federal preemption preclude the applicability of the pendent or ancillary jurisdiction in such action?

STATUTES INVOLVED

Pertinent statutory provisions involved are Labor Management Relations Act, 1947, Sections 2(2) and (3), Section 13 and Section 303(a) and (b) [29 USCA 152(2) and (3), 163 and 187(a) and (b)]. They appear in Appendix C hereto (pp. 8a, *et seq.*)

STATEMENT OF THE CASE

1. THE JUDGMENTS OF THE DISTRICT COURT AND OF THE SIXTH CIRCUIT.

Asserting jurisdiction under the Act's Section 303, Companies charged UMW with responsibility for strike

activity in March, 1959 and thereafter and for attendant property loss to Sunfire and business and profits loss to both Sunfire and Ashlo.

In a jury trial, wherein UMW motions to strike the evidence "not connected up to" UMW and for directed verdicts were denied (283a, 284a, 331a), the district court, on jury answers responsive to interrogatories (11a, 352a, 367-9a), entered judgments on June 7, 1961, that Sunfire recover of UMW $250,000.00 and that Ashlo recover of UMW $14,000.00, each with costs (A. 6a).

Thereafter, on June 28, 1961, the district court entered an order, dated June 27, 1961, overruling UMW's post-judgment motion to set the jury verdict and the money judgments and for judgment in accordance with UMW's directed verdict motions or, in the alternative, for a new trial (A. 6a).

Upon UMW's appeal, the Sixth Circuit by judgment of February 16, 1963 (A. 7a), and based upon an opinion (A. 1-5a) of the same date, affirmed the judgments against UMW. A rehearing petition was rejected on June 10, 1963 (A. 7a).

2. THE ISSUES AND HOW THEY WERE DECIDED

a. The Issue of Liability Under Section 303

Sunfire owned a coal tipple at Combs, Perry County, Kentucky, which it leased on May 13, 1958 to Ashlo (49a). They maintained offices in common (21a). Ashlo's General Manager Mathis was Sunfire's assistant to the general manager (21a). Neither produced coal (20a). Ashlo bought coal from 10 to 15 small mines (20a) and, with 8 or 10 employees, processed it, loaded it in railroad cars and readied it for market (20a, 40a). Coal was hauled to Ashlo's tipple by trucks, some of which were driven by owners thereof and others by owners' employ-

ees. There is testimony that neither Ashlo nor Sunfire had any control over the drivers (24a, 210a), hired them (93a, 171a) or directed their work (87-8a, 93a, 99a, 210a), and that Ashlo did not pay the truckers (24a), coal being delivered to Ashlo at "a delivered price" (24a).

Ashlo had no sales organization (56a), but Sunfire, whose employees were its corporate officers, an engineer and a few construction employees at the tipple, undertook to sell the coal.

The National Bituminous Coal Wage Agreement of 1950 was amended in 1958.[1] When 176 former contract signatories refused to execute it, UMW's District 30 sent them contract termination notices (223a, 229a, 298a), offering to negotiate a new agreement (229-30a). In meetings held March 14 and 15, 1959, District 30 President Hibbitts, explaining that some operators had not signed, advised UMW members of the necessity of picket lines. Instructions to and by District 30 field representatives and to UMW members alike, the undisputed testimony shows, were that picketing activities were to be peaceful and without weapons (224a, 230a, 294a, 299a).

Picketing commenced March 16.[2] To ascertain which mines were working, the men proceeded in a motorcade, accompanied by state police (115-6a, 300a). This lasted only three days (108a, 299a). Then picket lines were established at different locations (299a) and continued until April 30, when the National Labor Relations Board obtained an injunction (235a, 239a). *After April 30 there was no authorized picketing* (235a).

In March, 1959, neither Sunfire (42a) nor Ashlo (24a) was "under contract" with UMW (303a). Both refused to sign the 1958 Agreement (25a, 36a, 46a). Included in

[1] Herein called "1958 Agreement".

[2] Unless otherwise indicated, all dates refer to the calendar year 1959.

the operations picketed was the Ashlo tipple. Aside from the mines which produced coal sold to and processed at the Ashlo tipple, there is no evidence of any business relationship between Companies and the remaining 176 companies from which District 30 sought UMW contracts.

(1) PICKETING AT THE ASHLO TIPPLE

Pickets are stationed across river from tipple

Ashlo's tipple is located four miles from Hazard, Kentucky. A highway bridge crosses Kentucky Route 80 about one-fourth of a mile up the river from the tipple. At the end of the bridge nearest Hazard, a truck road leaves the highway and goes "down under the state highway bridge and out to the tipple" (302a). A picket line, maintained night and day, was composed of former employees on strike for better wages and of people living in the neighborhood (78a, 309a).

According to Ashlo's General Manager Mathis, fifty to three hundred pickets were there all the time until state police moved them "off our property" about the last two weeks (27a), although there is testimony these pickets were stationed on property not owned by Sunfire or Ashlo (307a) across the Kentucky River from the tipple and the road leading to it. Undisputed, however, is the testimony that between the pickets and the tipple, state police were stationed both "at the mouth of the road going under the bridge" and also "over with the pickets at the other end of the bridge" (38a, 302-3a).[1] John Stubblefield and Steve Fields were in charge of the picketing by direction of District 30 Field Representatives Matt Combs or Bill Perkins (298a, 309a).

Picketing events on March 16, 30 and 31

The tipple did not operate March 16 because at least

[1] See drawing of the location of the tipple, roads and river (354a).

five former tipple employees out of 8 or 10 Ashlo employees joined the picket line. Among former employees who joined the pickets was James Morris. At first there were 15 or 20 pickets (64a), but according to Mathis, traffic later was "all tied up" although "they weren't all pickets" (26a), and there were several hundred pickets "on the highway, over on the shoulder on the right-of-way" and on Sunfire property (26-7a).

Ashlo did not try to operate the tipple until March 30, when, at Mathis' suggestion, the men returned but "didn't go to work" (29a). However, Ashlo hired "every man that come around on the premises that wanted a job" and the tipple operated on March 30 (30a). Four or five of the strikers came into the tipple and asked Mathis "to shut the tipple down"; Mathis refused; and Mathis related—and it was denied (296a)—"one of them pushed a couple of men off the tipple" (30a). That day a picket stopped a crusher; Mathis shut the tipple down. *After each incident, work was resumed* (31a).

The next day, 50 to 300 pickets, as Mathis estimated, were stopped by state police from coming to the tipple; and it operated (31a). One employee credited Perkins saying there would be no work until a contract was signed (170a).

On March 31, with 17 or 18 state troopers present, an estimated 50 or 60 pickets, described by a trooper as "fairly well behaved" (152a), were stopped from going to the tipple by the troopers (151-2a). Later, 3 or 5 women (152a, 179a) appeared and two of them, going through the troopers' cordon line, "got the men . . . excited", and state police arrested Jasper Wright for attempting to incite a riot (152a), but no action was ever taken on the arrest (154a). A trooper stated he saw Field Representative Perkins there, agreed he may have left, and admit-

ted that after Bill Perkins returned, there was no further trouble (155a), although 25 or 30 pickets remained (179a).

Picketing Events on April 24

There was evidence that on April 24 pickets appeared at Combs in large numbers.[5] Though one trooper did not see Bill Perkins until after the incident described below had occurred (159a), another related he saw Perkins and asked his assistance in unblocking the road and declared Perkins inquired if the trooper had asked the men not to do so. When pickets attempted to go down the side road under the bridge, several troopers, out of 12 then present, stopped them (112a); by agreement with the troopers, three pickets, accompanied by a trooper, had a discussion with Companies' Mathis, who related the pickets wanted him to close the tipple down; he refused; and upon his statement that Companies offered to meet with UMW to negotiate a contract "we can live by" and "stay in business", the pickets stated, "Well, we've got a contract here you can sign and take it" (36a). Two strike breakers, present on the occasion, admitted pickets told them "we were taking other people's jobs" (180a), and that they would give them a voucher and feed them if they would not take their jobs and would join the strike (187a). One strike breaker charged a picket with the statement that if Mathis would not close the tipple, trucks would be stopped at the bridge and "if you don't get any coal, I guess you will close it down" (37a, 181a); and a truck driver charged pickets said, "Go ahead and let him dump, he won't be hauling there long" (96a). Pickets dispersed when instructed by Perkins (113a).

A picket, testifying for Companies, related that when the pickets started to disperse, Perkins told him "to go

[5]Mathis testified "it looked like there was a thousand" (35a).

home" and "That we didn't have to come down any more, that they would take care of it (216-7a), meaning, "Take care of the mine" (218a).

The Ashlo tipple burns on April 25

The Ashlo tipple burned shortly after 6:00 a.m. on April 25.

The picket line, composed of 12 or 15 men (291a), *was across the river from the tipple* (160a, 291a). Nine troopers arrived around 6:00 a.m. (160a). Prior to the fire, *three carloads of state police* were stationed so that one group was "on each side of the bridge, each side of the river" (292-3a) and between the picket line and the access to the Ashlo tipple (160-1a). Prior to the fire one car of troopers was sent "up on the bridge", and one car was kept "this side of the bridge, on the Combs side of the bridge" (160a).

Trooper John Hill could see the tipple from where he was stationed and saw a man running from the tipple's left side into the mountains behind the tipple (162a), but could not identify him at that distance. Within 15 minutes, he noticed the fire. The man did not come out of the mountain (162a).

State police detective Wood began investigating "about 6:20 to 6:30" (163a). Back of the tipple (163-4a), he found "signs going up the back of the tipple" to a slate dump, "where a person had come down over the slate dump" and had gone back into the woods to the left of the coal tipple. Wood was advised "there had been some guards there that night" who were not then present, but that there "was a lady there when I got there and one gentleman, a part owner of the company". He trailed the footprints with bloodhounds down the river and found a U. S. Army belt about 200 yards up the hill,

"where a person or persons had been sitting" (164a). He found "at least two persons' tracks" had gone down the river and "following the bloodhounds to a foot-bridge some miles down the railroad track" where he lost track of any sign of any person "because across the bridge and near the end of the bridge there had been a fresh car sign" (164a). The car came back towards Combs (165a). Wood was never able to pick up the trail or to ascertain or identify the person or persons who set the tipple afire (165a).

Six guards, on duty at the Ashlo tipple prior to its burning on April 25 (165a), were supposed to work a 12-hour shift, from 6:00 p.m. to 6:00 a.m., but admittedly left early April 25. Two fixed the time of leaving as "about 5:30" (189a, 199a), while others fixed it at 6:00 a.m. (193a, 195a). The guards claimed they left together in one automobile (189a, 193a), although one believed there were "just four" with him that night (191a).

The guards were the "closest to that tipple" (166a). The "next closest people to the tipple" were the state patrolmen on the bridge (166a).

There is a railroad track near the Ashlo tipple (354a), which is used by persons as a walkway going to their homes (190a).* People living down the track ordinarily use it near the tipple to walk home; and guards saw unidentified persons around 10:00 p.m. and midnight (190a, 204a).

Another guard related that before the guards drove away that morning, the guards had been all together about an hour (193a). Asked whether anyone left the group in that time or had an opportunity to "set the tipple on fire before you left", two guards answered, "No. I

*A photograph of the tipple is found at 359a, and a "plan view" at 360-1a.

don't think so" (190a, 194a). A third guard admitted the guards had not stayed together "in one little cluster all night" and were separated most of the time (194a); he did not know what the other guards were doing when he wasn't with them; and "It's a possibility" any one of the guards would have had a chance to have planted the fire while he was not with them (195a). *Two guards did not testify.* Four guards (192a, 195a; 197a, 199a) testified the state police were at the end of the bridge when they left.

A Sunfire employee related a coal truck came "down the road", past the picket line during the night of April 24-25; he did not know who was in the truck, but after it passed, he heard dynamiting "Over in the edge of the bottom just below the highway from where we was standing, down below us" (294a).

Ruby Baker charges the tipple burning to James Morris, who denies it. Ruby Baker's admissions impeach her charge against Morris.

Ruby Baker, who on April 24 had resided at Bonnieman, Perry County, Kentucky, related that around 5:00 p.m. on April 24, James Morris brought his wife and children to "stay all night" at the Baker home (204a). Both James Morris and his wife admit this (286a, 289a); but they went at Ruby Baker's invitation, which Mrs. Morris accepted subject to the condition that Morris "would take us" (285-6a), and he acquiesced. Morris did not stay at the Baker home that night (286a, 289a). Morris avowed, and there is no contradictory evidence, "I stayed all night at home" and arose about 6:00 a.m. on April 25 and heard the state police siren. He then "went off the hill" when he first learned the tipple was on fire sometime between 6:00 and 6:30 a.m. (289a).

Ruby Baker's version is, on the morning of April 25, Morris "pulled up into my yard in his car and jumped

out and come running through the house" (204a) and told her "to run out in the yard to the car and get the gun"—a high-powered rifle; she asked him where the gun was and, following his instructions to "Raise the back seat", she got the gun, took it in the house and hid it (205a). According to Ruby Baker, Morris was "dirty" and "all excited" (204-5a). Mrs. Morris, however, denies Ruby Baker got a rifle out of Morris' car or that there was any coal dust on Morris when he came to the Baker home (286a). Mrs. Morris' testimony is Morris said nothing about the tipple except "the tipple was on fire, was all" (286a). Ruby Baker attributed to Morris a statement that, "I guarantee her to go down now, I guarantee the tipple to go down" and that when his wife retorted, "Oh, I bet you", Morris replied, "I bet you; I guarantee her to go down this time" (205a). Morris denied he had anything to do with the burning of the tipple (290a), avowing there has never been any charge made against him by anyone in any court that he had anything to do with the tipple's burning (290a). No evidence contradicts Morris. Mrs. Baker and Mrs. Morris agree they went to the tipple while it was burning (205a, 287a).

Bessie Bryant, wife of an Ashlo employee prior to the 1959 strike (287a), testified Ruby Baker told her if she would make an affidavit that Jim Morris burned the tipple, she would get a thousand dollars which was to be divided between her and Ruby Baker; she refused, telling Ruby Baker "'I don't know that Jim Morris done it" (288a). Ruby Baker denied this statement (207-8a).

However, Mrs. Baker, no longer living at Bonnieman, now resides in Lexington. She does not work there, but gets a government check. Denying she was getting any money from Sunfire or Ashlo (206a), when Sunfire and Ashlo's Mathis was pointed out to her in the courtroom,

she admitted that while living at a hotel in Lexington, Mathis came to her door and handed her $100.00 cash; she also got free hotel room there and free meals for her whole family; and Mathis got her a house in Lexington on Stone Road where she was residing (206-7a). Mrs. Baker admitted she had never gone before the grand jury to tell them anything about Morris' burning the tipple (207a). *Mrs. Baker had never seen Mathis before.* Asked if Mathis "has been an angel since then", Ruby Baker replied, "Somebody has been an angel. I don't know who it has been, but thank the Good Lord somebody has" (209a).

The Sixth Circuit agreed "The record discloses *no positive evidence* of the origin or of the originators of the fire" but declared, without specifying, "there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant" (A. 3a). Though acknowledging that UMW had in detail reviewed the evidence "in support of its argument that the evidence did not support the jury's verdict as to its responsibility for the burning of the tipple", it regarded it sufficient "to say", again without specifying, "that no justification appears for disturbing" the trial court's judgment (A. 4a), thereby avoiding reference to Ruby Baker's admission of her receipt of cash from Mathis at the door to her hotel room, her admission she had never seen him before, her admission of free room and board for herself and children at the hotel and that Mathis had gotten her the house in which she resided in Lexington. *The summary fashion in which it disposed of the incident permitted the Sixth Circuit to avoid the cogent fact that when Mrs. Baker testified, Mathis sat in the courtroom and was not called to explain his economic generosities to Mrs. Baker.*

There was no evidence that Morris was an UMW agent.

Another crucial issue was that of *agency*. The Sixth Circuit's opinion is not responsive to UMW's position that even though the evidence warranted a finding Morris destroyed the tipple (which UMW denies), there remained the issue of agency and *there was no evidence that Morris was an agent of UMW to warrant imputing responsibility to it for Morris' act*. Though the Act's legislative history shows a union member is not *per se* a union agent, and federal courts and the National Labor Relations Board have so proclaimed, the five Interrogatories answered by the jury were predicated upon its belief that conduct had been committed by UMW through or by "its officers, agents, representatives or *members*" (367a), and *the jury*, in formulating its findings, was thus *led to believe, erroneously, that regardless of an agency relationship, acts of members were attributable to UMW*. This was emphasized by the district court's statement to the jury that officers of the union and district "and the members of the union and . . . of the district are largely identical . . . as far as representation of the union is concerned" (340a).

Picketing activities in relation to truckers delivering coal to Ashlo's tipple

Four drivers hauling coal to Ashlo testified either they were afraid of the pickets (71a, 96a, 175a), or they were called "scab" or other obscene names (72a, 88a, 172a) or threatened (89a, 173a) or had rocks thrown at them (101a), yet each admitted delivering every load of coal to Ashlo's tipple (72a, 90a, 101a, 172a), admitting the pickets "never did bother me" (73a) or "No, I never did turn back with one" (90a).

There is evidence that truck drivers encountered roof-

Additional incidents admitted in evidence over UMW objections, and which show total unconcern with the necessity of proving agency are discussed, post, pp. 34-41.

ing tacks on the road leading to the tipple (74a, 94a, 180a). One related he found them in front of Lonnie Wright's house, Wright and Morris attempted to stop men attempting to get the tacks from the road, and that Morris "had a pistol in his front pocket" (76a). Another trucker stated Morris told employees sweeping the tacks from the road to "Let them lay there" (95a).

Similarly, a trucker found his "tailgate had been tripped", about a ton of coal spilled (100a), and his "tires cut" after returning to his parked truck; and while he included Lonnie Wright among three pickets he saw, he did not impute these acts to pickets; when he backed out to go home, about 30 pickets were present and rocks were thrown at him, nevertheless the next day he delivered the coal to the tipple at a time when again about 30 pickets were present (101a). When he reached the bridge, and 200 to 300 pickets were there, one jumped on his truck but did not succeed in getting the door open (101-2a).

A non-union coal producer, who hired three drivers to transport coal to Ashlo, claimed his drivers were stopped at the bridge daily and several times "half-way between the tipple and the bridge" (210a), and related state police would open the road (211a). On one occasion a bottle hit one of the trucks (211a). The drivers did not testify and the producer admitted there were no other assaults on the trucks other than "tripping the tailgates and letting coal out on the road" which occurred just once (211a). He admitted the "balance" of the coal was delivered, as was every other truck of coal he started to the tipple (213a).

Similarly, though "violence on the picket line" has been held "not material" and would not in itself bring complained-of conduct into conflict with the Act's secondary boycott provision (*NLRB* v. *Int. Rice Milling Co.*,

341 U. S. 665, 672), and UMW directed the Sixth Circuit's attention to the predominant status accorded the element of violence by the district court,[11] the Sixth Circuit's opinion does not concern itself with this contention. Similarly, while Companies complained that pickets engaged in name-calling to truckers delivering coal and UMW countered with this Court's rule that name-calling is offensive only when it intimidates and that truckers had delivered to Ashlo all coal designed for delivery there, the Sixth Circuit was unconcerned.

Picketing Incidents relating to the L & N train crew

The L & N Railroad served the Ashlo tipple. Its supervisory employees, as Companies' witnesses, testified the railroad had difficulty in placing and pulling cars to the mines when pickets in groups described as "From small to large"—estimated at 50 or 60—stationed themselves at switches leading to the coal tipple (141-2a); that pickets carried placards reading "On strike, no contract plan, District 30, U.M.W.A." (148a); that "regular train crews wouldn't pass them and the personnel department officials[12] would have to place and pull cars" (142a); but, railroad's regular employees "have long been union men" and would not cross the picket line (144a) and after throwing the switches and starting in, *these officials had no difficulty* (142a). When pickets hollered "at the train crew", they "would get off the train" (28a). *It is also undisputed that the supervisory personnel was "able to render the same service to the mines and the tipples as had been rendered before the strike"* (145a).

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[11] The district court refused UMW's instruction 5 which was based upon the *Int. Rice Milling Co.* case (333-35a).

To show the trial court's emphasis on the element of violence, the district court's charge appears in Appendix D hereto, pp. 23a et seq.

[12] These were "trainmasters and assistant trainmasters and assistant superintendent" and other willing officials (143a).

Railroad personnel recounted that on an occasion after supervisory personnel placed empties and pulled the load at Combs and were in an automobile, some 250 or 300 pickets swarmed around and kept saying to turn the car over, but L & N's traveling engineer pointed out "we got out without too much trouble" (145a) and no attempt was made to turn the car over (149a). Actually, L & N's Deaton testified, it is not unusual for pickets "to get hotheaded and lose their temper and say things that they don't do and probably don't intend to do" and for that reason no attention was paid by the supervisory personnel to the pickets' statement (150a).[12]

Picketing of the switches commenced March 26 and ended April 16, following a federal court injunction obtained by the railroad against UMW (142-3a).

The Sixth Circuit did not answer UMW's contention that train crew incidents did not fall within the Section's scope because no District 30 officer or agent was shown to have been present; that "picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer";[13] that the Act's Section 2(2) and (3) excluded employees subject to the Railway Labor Act.[14] Moreover, UMW pressed upon the Sixth Circuit that this Court's *Local 761* (366 U. S. 667) and its application by

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[12] Deaton also testified that on April 7 at the Monaco Coal Company, when he "went out with a mine crew at Carrs Fork", he encountered a beech log in the middle of the track and some 25 or 30 pickets standing at one side. When Deaton asked that it be rolled off the track, Paul Hurd and two or three others told him, "if we moved that log there would be plenty of bloodshed" (147a); but the train crew moved the log and there was no trouble about it (147a).

[13] *Local 761, Electrical Workers v. NLRB*, 366 U. S. 667, 673-4

[14] These activities occurred prior to the Act's amendments in September, 1959. Discussion of the issue by the NLRB from its 1957 Annual Report appears in Appendix C herein (A. 14a). Pertinent legislative history of the amendments showing the validity of the Board's position and that of UMW herein appear also in Appendix C herein (A. 14-15a).

National Labor Relations Board in *Local Union No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127, 129, demonstrate the train crew incidents were not proscribed by the Act's Section 303;* but the Sixth Circuit's opinion is silent thereon.

(2) PICKETING ACTIVITIES AT OPERATIONS OTHER THAN ON COMPANIES' PROPERTIES.

Over UMW objections (110a), the trial court permitted the jury to hear of activities at operations other than on Companies' premises. A motorcade of 250 to 300 cars gathered at Darfork, Kentucky, on March 16 with 300 to 1,000 pickets, which went from place to place, remaining approximately one hour at each place. Mass picketing at Colson caused the road to be blocked on March 17, and a trooper claimed pickets attempted to turn over a coal truck. He recognized District 30's Bill Perkins who was asked to stop the men, which Perkins did after thirty to forty-five minutes. On another occasion Perkins was again asked to assist in having the men disperse: Perkins did so (111a). There was no violence and no trouble on this occasion (112a). On a third occasion at Colson, 1,000 —more or less—pickets were stopped from going to the tipple by 17 or 18 troopers (113a), with Perkins present (114a).

A trooper also told that a large number of women pickets blocked the road of Hardburly when a coal truck driver wanted to go through, and the trooper, telling the men to get the women and the men off the truck and to

*The Board's *Carrier Corporation* case was reversed in *Carrier Corporation v. NLRB*, 2 Cir., 311 F. 2d 135 (Chief Judge Lumbard dissenting); the Supreme Court granted certiorari (*United Steelworkers of America v. NLRB*, 10 L. ed. 2d 410, Case No. 925); and it is now pending, with the following question to be answered:

"Does Section 8(b)(4)(B) of LMRA prohibit union which is engaged in a lawful strike at an industrial plant from picketing at gate through which railroad-owned spur track enters plant, for purpose of inducing persons employed by railroad not to make pickups and deliveries at struck plant?" (53 LRR 165).

open the road", motioned the driver "to go through"; and he did (113a). *No union representative was present* (113a). One unidentified man was arrested and though charges were pressed, the grand jury did not indict him (117a).

At Hardburly, on March 31, a trooper arrested two women among the pickets, for throwing rocks through the windshields of trucks coming in to unload coal (155-6a).

Earl Spencer, who worked on an auger for Chavies Mining Company, testified an auger and shovel were blown up while he was working around July 10 (213-4a). He attributed the dynamiting to Walter Turner who was indicted but acquitted (214-5a).

(3) MEETINGS BETWEEN UMW AND OPERATORS

District 30's President Hibbetts arranged a Washington, D. C. meeting between operators and UMW representatives to talk about a bargaining contract. Present for UMW were its then Vice-President Thomas Kennedy, Tony Boyle, John Owens, Hibbetts and others (127a, 134a). Some twenty coal operators (231a), including non-union operators Richie, Dick Johnson and Stamper Collins (127a, 130a, 134a), who claimed they discussed making a contract "the truck mines could live with" (127a); an operator inquired what could be done to stop the violence in eastern Kentucky, and the response thereto "Sign the contract" (127a, 130a), which Richie attributed to either Kennedy or Owens (127a) while Johnson and Collins charged it to Owens (130a, 135a). *Johnson and Collins both admitted the operators made no actual accusation* that *union officials* had anything to do with the violence (132a, 138a).

A second meeting in Frankfort, Kentucky was attended by Boyle, Hibbetts and others representing UMW (47a,

130a, 133a, 135a). Kentucky's Governor had representatives there (131a), as did the Federal Conciliation Department (132a, 133a). An estimated 25 to 40 coal operators were present (133a, 137a). Non-union operators attributed to Tony Boyle, when asked what might prevent or stop the violence, the reply "Sign the union contract" (47a, 131a, 135a). While Hibbetts stated violence was discussed (236a), Collins, asked whether any operator or person accused UMW of having anything to do with violence, answered, "Directly accused, no, sir, I wouldn't say so" (138a). Hibbetts complained operators were "creating the majority of this lawlessness" (237a), denied the statements attributed to UMW representatives in Washington and Frankfort (231a, 233a, 236a); declared, and his testimony is not contradicted, an *operator from Pikeville* stated *if UMW insisted on the contract, "the Big Sandy River would be running with blood"* (232a); and credited Boyle saying at Frankfort, "we would do what we could to have peace and harmony because we knew way to keep the peace" (234a).

Other conferences were held, too, in Lexington under auspices of the Labor Department's Conciliation Department (232-3a). Hibbetts met too with operators "along with the Ministerial Association, at Whitesburg" (234-5a), and wrote the Sheriffs of Letcher, Perry, Knott and Pike Counties, offering assistance "in every way possible to keep the peace" (234a).

(4) THE SIXTH CIRCUIT HOLDS PICKETING AT THE ASHLO TIPPLE TO BE SECONDARY ACTIVITY.

In the Sixth Circuit, as in the district court,[7] UMW contended, as a matter of law, the evidence did not sup-

[7] UMW's motions for directed verdict (284a, 331a) asserted, "There is no evidence" UMW violated Section 303 and the "evidence fails to show any wrongful or unlawful act for which" UMW "under applicable law may be held liable". See, too, UMW's post-trial motions for judgment in accordance with directed verdict motions (12a).

port a finding that UMW had engaged in conduct banned by Section 303 and had injured Companies' property and business within that Section's meaning. It urged that picketing at the Ashlo tipple was primary, and not secondary, activity; it emphasized the lack of a "neutral employer" heretofore proclaimed to be a *sine qua non* of a secondary boycott under the Act and that picketing was to secure a UMW contract not alone from Companies but also from producing operators and truck drivers' employers; and it repeatedly directed the Sixth Circuit's attention to criteria enunciated by this Court in *Local 761, Electrical Workers v. NLRB*, 366 U. S. 667 (1961) and insisted that implementation thereof condemned any finding that UMW had committed activity banned by Section 303.

In its opinion (A. 1a), it recognized District 30 also sought contracts from 176 coal producers who had not signed the UMW contract; it conceded *"To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them"* (A. 3a), it nonetheless held that picketing at Ashlo's tipple "was not merely permissive primary picketing, but was a secondary boycott within the meaning of Section 303" (A. 4a). It reasoned that, "Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple" (A. 3a). To reach its conclusion, the Court "specifically reject[ed] defendant's contention that Ashlo employees were themselves picketing for higher wages" (A. 3-4a), although the unchallenged evidence showed that at least five of Ashlo's eight or ten employees joined the picketing to obtain higher wages (64a, 78a, 180-1a, 187a, 288a). The Sixth Circuit's further reasoning was that "defend-

ant's strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet-operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant" (A. 4a).

The Sixth Circuit's opinion is silent as to UMW's strong position that *Local 761* (366 U. S. 667) challenges the jury finding and the district court's conclusion of UMW liability; and UMW's request that the Sixth Circuit "explain if or why it believes" *Local 761* to be inapposite[5] remain unanswered.

b. The issue of improperly admitted evidence in relation to agency.

In the trial court, over UMW objections (82a, 86a), two employees (83-6a) of doctors who had treated James Morris for injuries were permitted to show that medical bills charged to Morris had been paid by the UMWA Welfare & Retirement Fund (82-4a). Agreeing the Fund was "a separate organization" from UMW (83a) the district court, equating agency with membership, declared "You can show that Mr. Morris . . . was not a member of the union or had no rights in the union (84a). Rejecting UMW's complaint that this evidence was improperly admitted, the Sixth Circuit held (A. 5a): "Whether or not" UMW and the Fund "are separate entities, evidence that the latter had paid medical bills charged to an individual was properly received *on the issue of his relationship with*" UMW.

Likewise, the district court admitted, over UMW objections (80-1a), a state trooper's statements concerning stopping a car, in an area other than at the Ashlo tipple,

[5] See Petition for Rehearing, pp. 4-5.

in which Morris and another person rode on May 14, 1959 —after picketing ceased and after the Ashlo tipple burned on April 25 of that year—and finding ammunition and a gun (80-1a). Admittedly, the trooper did not arrest the men and conceded he did not regard the incident as sufficient to charge either of them (81a). Since the evidence did not show any UMW connection with the incident, UMW moved to have the evidence stricken, which district court denied (283a). To UMW's argument that there was no showing of agency between UMW and either of the persons and its admission was prejudicial, the Sixth Circuit, unresponsive to UMW's position, declared, the district court properly overruled the objection "since the jury had a right to consider this evidence in determining whether there was a concert of action *between the two individuals*" (A. 5a).

Without identifying who had committed the acts and without showing UMW's responsibility therefor, and *over* UMW objections,[1] witnesses told the jury that Companies' properties were dynamited, Companies' Mathis stating they "were dynamited about three different times" (32-3a, 47a, 68a, 88a, 202a). Two of such witnesses admitted not knowing who had done the acts (88a, 177-8a).

Without identifying who had committed the acts and without showing UMW's responsibilities therefor, and *over* UMW objections (122a), eight non-union coal operators and one union operator told the jury that during the strike each suffered property damage by fire or explosion (122-3a, 125a, 126a, 128a, 130a, 134a, 138-9a). None identified the actors; several admitted they did not know who they were (125a, 139a, 140-1a). Though authorized

[1] Objections appear at 32a, 68a, 73a, 177a. In addition, motion to strike the evidence "not connected up" to UMW was rejected (283a). See too UMW's post-trial motion for judgment or new trial overruled by the district court (13a, 17a).

picketing ceased after April 30, 1959, two incidents occurred in July or August, 1959, one in May, 1959 and another in March, 1961 (128a, 140-1a).

In its opinion (A. 4a), the Sixth Circuit approved the admissibility of such evidence under authority of its prior decisions in *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den. 368 U. S. 875; *Flame Coal Co. v. UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891; and *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U.S. 881.

c. The issue concerning instructions refused, the jury charge, and the submission of Interrogatory 1 to the jury.

Because Companies asserted jurisdiction under the Act's Section 303, and the Sixth Circuit has held UMW engaged in secondary boycott picketing, it becomes pertinent that the district court refused UMW's Instruction 3, containing the elements essential to a violation of that section (333-34a), and by which the jury would have been instructed on the difference between a primary employer and a "neutral" employer. Nowhere in the court's charge is this distinction noted (A. 23-34a). Instead, the jury was told that (338a) plaintiffs claimed UMW induced and encouraged *employees of producers* engaged in hauling or supplying coal to the tipple to refuse to do so, *with the object of forcing these plaintiffs to join the union*. UMW objected to the trial court's refusal to give Instruction 3 (348a).[a] So, too, when the trial court submitted its interrogatories to the jury for answer, UMW noted objections to Interrogatory No. 1 because "it does

[a] In stating its objections to the jury charge, UMW counsel stated:

"The Court erred in refusing to give the Instructions as tendered by the defendant in its Instructions Nos. 1 and 2.

"The Court erred in its Instruction with reference to the secondary boycott provision, as sued upon in the complaint, in that the Court did not define boycott in the terms of the Statute, that is, Section 303 of the Labor-Management Relations Act of 1947; and the Court erred in refusing to give Instruction No. 3 with reference to the boycott as tendered by the defendant."

not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs" (15-17a), 337a, 349a). Like the court's charge (338a), the interrogatory posed the inquiry whether UMW's purpose was to force or require *"Plaintiffs to join the Union"*.[b]

Likewise, UMW complained to the Sixth Circuit of the trial court's refusal to give its proffered Instruction 4 dealing with primary picketing, as well as proffered Instruction 5 which would have told the jury, under the holding of *NLRB v. Int. Rice Milling Co.*, 341 U.S. 665, 672, that violence, if any, is not material in a Section 303 violation. UMW's objection to such refusal is recorded (349a).

The Sixth Circuit, regarding the charge to be "without prejudicial error" (A. 5a), declared it unnecessary to pass "upon that question" or "to consider the propriety of the trial court's rulings on Interrogatory 1 and its refusal to give certain instructions requested by defendant because UMW had not met the requirements of Rule 51, Federal Rules of Civil Procedure, which, the appellate court notes provides for "stating the matter to which he objects *and the grounds of his objection*" (A. 5a).[c]

d. The issue of damages.

In both lower courts, UMW asserted the lack of evidence to support the jury's award of damages both to Sunfire for $250,000 and to Ashlo for $14,000.

UMW pointed out that Ashlo employees continued to work (*ante*, p. 9); truckers delivered all the coal that each of them had for delivery to the tipple (*ante*, p. 16-17); and the evidence did not warrant a jury verdict of UMW responsibility for the tipple's burning (*ante*, p. 10-15).

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[b]The interrogatories and answers thereto are found in the Supplemental Appendix filed by UMW in the Sixth Circuit (p. 367a).

[c]Emphasis is that of the Sixth Circuit.

Though the Sixth Circuit agreed, "The record discloses no positive evidence of the origin or of the originators of the fire" (A. 3a) it declared "there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant" (A. 3a).

The Sixth Circuit's opinion does not deal specifically with the damages issue, except as indicated above. However, it does recite that it suffices "to say that no justification appears for disturbing the judgment of the trial court or its order denying defendant's motion for a new trial on numerous grounds, including this one" (A. 4a).

e. The issue whether Sunfire Coal Company is a person who may maintain an action under Section 303.

In its answer (7a), UMW asserted that Sunfire "is not such a person as may maintain an action against" UMW. The evidence showed Ashlo had no sales force (56a) to sell coal purchased and processed by it, but that Sunfire "helped in the sales of the coal" (22a) for Sunfire's profit (56a). Sunfire's Vice President Davis related that Sunfire "made a material effort in the sale of coal" (40a). In Sunfire's lease to Ashlo it was provided that Sunfire was to receive a monthly per-ton rental "for all coal processed and *sold*" (49a). The Sixth Circuit rejected UMW's contention that the trial court was without jurisdiction, power and authority over Sunfire's claim, saying, "This argument is completely untenable" (A. 5a) and that Sunfire's situation "was not comparable to *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, upon which UMW relied.

f. The issue of jurisdiction of the non-federal cause of action.

The complaint predicated the district court's jurisdiction under the Act's Section 303. UMW's answer (7-8a)

asserts "there is no basis for jurisdiction to adjudicate any non-federal cause of action" (8a). The district court, under authority of *UMWA v. Meadow Creek Coal Company, Inc.*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013, rejected the dismissal motion. In the Sixth Circuit, UMW contended that the district court was without jurisdiction, authority and power to hear matters based upon the non-federal common law claim under the doctrine of pendent or ancillary jurisdiction for reasons discussed *post*, pp —. While the Sixth Circuit's opinion does not deal specifically with this issue, it asserts that "The remainder of the defendant's contentions . . . do not here require discussion", affirming the district court's judgment (A. 5a).

REASONS FOR GRANTING THE WRIT

I.

a. The Sixth Circuit's decision and rationale herein that picketing at the Ashlo tipple constituted a secondary boycott banned by Section 303 squarely conflicts with principles and criteria enunciated by this Court's *Local 761, Int. Union of Elec. Workers v. NLRB*, 366 U. S. 667, as essential to a finding that a statutory secondary boycott was committed.

Local 761's holding is that where there is but one entrance to the plant of an employer engaged in a labor dispute with a union, and that entrance is used alike by employees of that employer and employees of another employer, "such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees" and is "outside the bar of 8(b)(4)(A)" (366 U. S. 682); and since picketing at Ashlo's tipple occurred at the only entrance provided a. ication of *Local 761's* doctrine shows unequivocally the conflict of

the Sixth Circuit's conclusion herein with that of *Local 761*.

Furthermore, in *Local 761*, this Court emphasized that "The key to the problem . . . is found in the type of work" being done by those passing through the entrance where picketing occurs (p. 680), and if such entrance is "in fact used by employees of independent contractors" and the work performed is "necessary to the normal operations" of the primary employer, such picketing is not conduct interdicted by Section 303 (p. 682). Where, as herein, coal hauled to the Ashlo tipple was brought there to be processed and readied for market, it was, as stated in *Local 761*, "necessary to the normal operations" of Ashlo and Sunfire.

b. Recently this Court granted certiorari in *United Steelworkers of America* v. *NLRB*, U. S. , 10 L. ed. 2d 410, Case No. 925, wherein the National Labor Relations Board implemented the *Local 761* doctrine in a situation where a union struck the Carrier Corporation after a break-down in negotiations and established picket lines at plant entrances and at an adjacent gate on a railroad right-of-way where, by mass picketing, pickets attempted to block the train's passage, and threats were hurled at the train's operating personnel. NLRB (one member dissenting) rejected the contention this conduct offended the Act's secondary boycott section, applied *Local 761's* criteria, and held because delivery of empty boxcars to Carrier and the transportation of Carrier products "clearly were related to Carrier's normal operations", the Act's secondary boycott provisions were not violated. *Local Union No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127, 130. The Second Circuit reversed (*Carrier Corp.* v. *NLRB*, 2 Cir., 311 F. 2d 135, with Chief Judge Lumbard dissenting because the

majority view was discordant with *Local 761* criteria; and three Circuit Judges opposed the Second Circuit's *en banc* rehearing denial. This Court granted certiorari therein; the case is currently pending; and this Court's decision therein would have a direct bearing upon the instant case, not alone as to the producers and truckers, but also as to the incidents relating to L&N's train crews (*ante*, p. 18-20), which UMW claimed did not ground a Section 303 violation and to which claim the Sixth Circuit did not respond. Nor did the Sixth Circuit respond to UMW's contention that railway employees do not fall within the Act's scope. See *ante*, p. 19 and footnote 15.

c. Notably, the Sixth Circuit's opinion makes no mention of *Local 761*, although UMW vigorously pressed upon that Court that *Local 761* condemned the money judgments against UMW and, in a rehearing petition,[32] asked it to explain if or why the Court believed *Local 761* to be inapplicable. Thus, it is evident that the Sixth Circuit deliberately refused, and will continue to refuse, to follow *Local 761*.

Though UMW complained of the Sixth Circuit's failure to adopt such criteria heretofore,[33] the Court has said that there is an absence of precedential value in the denial of certiorari and denial is not designed to reflect the Court's views as to the case's merits. *Parker* v. *Ellis*, 362 U. S. 574; *Polites* v. *U. S.*, 364 U. S. 426, 433, fn. 9. Moreover, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, this Court granted certiorari to reexamine a case in light of previous decisions. UMW borrows from a case in light of previous decisions, presenting important questions under federal statutes. UMW borrows from and approves the Petition for Certiorari statement (p. 22) in *United Steelworkers* (10 L. ed. 2d 410) that the

[32] See Petition for Rehearing, pp. 5-6.

[33] *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. denied, 371 U. S. 891, with Mr. Justice Douglas voting to grant; *Gilchrist* v. *UMWA*, 6 Cir., 290 F. 2d 36, cert. denied, 368 U. S. 875.

"law which imposes such heavy financial liability on unions ought at least to make clear what their obligations are."

d. In addition, the Sixth Circuit's reasoning in holding picketing activities at Ashlo's tipple to be a proscribed secondary boycott is directly opposed to this Court's requirement of a "neutral" employer in order that there be a boycott under the statute. *Local 1976, Carpenters* v. *NLRB*, 357 U. S. 93, 100, holding that a *sine qua non* of a boycott under the statute is the existence of a "neutral employer".

The Sixth Circuit agreed that "To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them" (A. 3a). Inherent therein is the admission that each of such producers was *a primary employer* having a primary dispute with the union. *Likewise*, since *Ashlo and Sunfire* refused to sign the UMW agreement, *each* of them, like the producers, *was a primary employer with a primary dispute with the union*. Hence, when the Sixth Circuit reasoned that "Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple" (A. 3a), the Sixth Circuit ignores the fact that all employers involved were *primary*, and that "Congress did not seek" by the boycott provisions "to interfere with the ordinary strike". *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 672.

The Sixth Circuit's opinion evades explanation of who constitutes the "neutral" or who is the employer who may be characterized as the one "not concerned with a primary labor dispute" essential to a statutory boycott. *Local 1976, Carpenters* v. *NLRB*, 357 U. S. 93, 100. If the court below sought to cast Ashlo and Sunfire in the role

of "neutrals" by rejecting UMW's contention that "Ashlo employees were themselves picketing for higher wages" (A. 3-4a), a ready answer is found in the uncontradicted evidence that at least 5 of Ashlo's 8 or 10 employees were among the strikers, picketing for higher wages they sought to achieve through their employer's executing the UMW agreement (64a, 78a, 180a, 187a, 288a).

While the opinion acknowledges the union sought contracts from 176 nonsignatory producers, the Sixth Circuit further rationalized that the union's "strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet-operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant" (A. 4a); but such reasoning is fallacious since it ignores that *each of the 176 producers was, like Ashlo and Sunfire, a primary employer.*

Furthermore, the Act's legislative history shows Senator Taft's declaration that the secondary boycott provisions "makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly *unconcerned in the disagreement between an employer and his employees*";[22] *but since there is no evidence that Ashlo or Sunfire did business with the 176 producers,*[23] *the object of picketing at Ashlo's tipple or at any other point could not have been to cause them to cease doing business with them.* Hence, as to such producers, picketing at the tipple or elsewhere had no relevancy and could not properly serve as a basis for holding UMW violated Section 303 as to Ashlo or Sunfire.

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[22]93 Cong. Rec. 8709, noted in *Truck Drivers, etc. v. Empire State Express, Inc.*, 5 Cir., 293 F. 2d 414, 422.

[23]With the exception of those concerned with producing and hauling coal purchased by Ashlo and as to whom it has already been shown no condemned picketing under Section 303 was involved.

II

The Sixth Circuit's approval of the money judgments against UMW herein sanctions a jury verdict of union responsibility an dliability for the acts of union members' without regard to the existence of an agency relationship between the members an dthe labor union, and is directly opposed to the standard of union responsibility heretofore enunciated by decisions of this Court and other federal courts, by congressional intent as reflected in the Act's legislative history, and by the National Labor Relations Board in implementing that intention.

Ever since the *Coronado* cases[24] federal courts have regarded labor unions as entities distinct from union membership. In the first of those cases (259 U. S. 395), proof of "actual agency" was declared a prerequisite to union responsibility. Later, in defining the Act's term "agent", Congress, as the Act's legislative history shows, intended to adopt the common law rules of agency. As its chief proponent, Senator Taft declared *"The fact that a man was a member of a labor union . . . would be no evidence whatever to show that he was an agent."*[25] In *Sunset Line and Twine Co.*, 79 NLRB 1487, 1508, Board stated: "Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal" and the "burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority". Accord: *NLRB* v. *Gottlieb & Co.*, 7 Cir., 208 F. 2d 682, 684; *NLRB* v. *Miami Coca-Cola Bottling Co.*, 5 Cir., 222 F. 2d 341. In *Sunset*, Board professed that the Act is not directed toward individual em-

[24] *UMWA* v. *Coronado Coal Co.*, 259 U. S. 344, 387, 391; *Coronado Coal Co.* v. *UMWA*, 268 U. S. 295, 304-5.

[25] See, Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 1204-5. Also see Appendix C hereto, p. 16a.

ployee conduct, and it "has a clear statutory mandate to apply the 'ordinary law of agency' " (p. 1507) and that *union members are not per se union agents* (p. 1508, fn. 41). In *Poinsett Lumber and Mfg. Co.*, 33 LRRM 1101, Board said, ". . . . it is well established that mere advocacy of the [union] by rank-and-file employees does not constitute them agents of the" union. In *International Ladies Garment Workers Union* v. *NLRB*, 99 App. D. C. 64, 70, 237 F. 2d 545, 551, the Court held that "imputation of the acts of one person to another" is forbidden "except when the one is acting as agent for the other". Accord: *NLRB* v. *Ohio Calcium Co.*, 6 Cir., 133 F. 2d 721. The Fifth Circuit, in *NLRB* v. *Marshall-Car Wheel etc., Inc.*, 5 Cir., 218 F. 2d 409, 417, rejected a contention that there was an agency relationship "between all strikers, the guilty employees, and the union".

Though UMW argued the requirement of agency proof, as well as the record's lack thereof, the Sixth Circuit's opinion contains no response to UMW's contention, and UMW submits this omission is significant in its challenge herein to the Sixth Circuit's approval of the district court's judgment.

To approve the jury verdict herein the Sixth Circuit had to ignore that such verdict resulted from the district court's permitting the jury to predicate UMW's responsibility and liability upon union members' conduct,[24] and the error thus committed was both accentuated and emphasized by the trial court's jury charge that "officers of the union and . . . of the district and the *members of the union and the* members of the district are largely identical as far as rights and powers and duties are concerned, *and as far as representation of the union is concerned*"

[24]The Interrogatories posed to the jury the question its belief that UMW "through its officers, agents, representatives or members committed wrongful acts (367-69a)

(340a), as well as by the trial court's refusal (A. 19a) to give UMW's proffered Instruction No. 2 (to which refusal UMW noted its objections, A. 34a) which would have told the jury that union members are not *per se* union agents and that liability depended upon clear proof that persons committing wrongful acts acted as UMW agents while acting within the scope of their employment or authority" (A. 19a). Yet, the Sixth Circuit deemed the jury charge "without prejudicial error" (A. 5a.)

Though UMW stressed that even if Morris were guilty of the tipple's burning (and even the Sixth Circuit admitted the lack of positive proof thereof), there was no evidence that Morris was UMW's agent as to justify imputing that conduct to it; and the Sixth Circuit did not refute UMW's agency contention.

Similarly, the Sixth Circuit stamped as properly admitted the testimony of two employees of doctors showing that medical bills for treatment to James Morris, a union member, had been paid by the UMW Welfare & Retirement Fund (A. 5a). Unless the testimony's purpose was to show an agency relationship with UMW, it could have had no relevancy. Though agreeing the Fund was a "separate organization" from UMW, and despite the district court's having *equated UMW agency with UMW membership* in stating before the jury, "You can show that Mr. Morris . . . was not a member of the union or had no rights in the union (84a)", the Sixth Circuit, *likewise equating agency with union membership*, approved the admission because "evidence that the [Fund] had paid medical bills . . . was properly received *on the issue of his relationship with UMW* (A. 5a). A vice of such reasoning is that evidence showed no more than Morris was an employee of a signatory operator to the UMW contract; it did not show

even union membership since membership is not the criterion of eligibility to participate in the Fund. *Gambrell* v. *Lewis*, 167 A. 2d 605 (Mun. Ct. of App. D. C., 1961).

The Sixth Circuit's obvious unconcern with the agency factor is further demonstrated by the incident where, over UMW objections, the district court admitted a trooper's statement concerning stopping a car, in an area other than at the Ashlo tipple, in which Morris and another person rode on May 14, after picketing had stopped and the Ashlo tipple burned, and found ammunition and a gun in the car, but neither arrested nor charged either (80-1a). To UMW's complaint that there was no showing of an agency relationship between UMW and either of the persons, the Sixth Circuit responded, "the jury had a right to consider this evidence in determining whether there was a concert of action *between the two individuals*" (A. 5a).

As the record shows, these errors have resulted in judgments against UMW in favor of Sunfire for $250,000.00 and in favor of Ashlo for $14,000.00. Thus, responsibility and liability having been permitted upon an erroneous theory, and the jury verdict being a general one,[2] reversal by the Sixth Circuit was required by this Court's *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29, holding, "Since we hold erroneous one theory of liability upon which the general verdict may have rested, it is unnecessary to explore the legality of

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[2] "The interrogatory submitted to the jury posed 3 questions, both answered in the affirmative (1) whether UMW, through officers, agents, representatives or members, to force or require "Plaintiffs to join the Union", induced or encouraged employees of producing companies, engaged in hauling or supplying coal to plaintiffs' tipple, to refuse concertedly to transfer coal from the mines to the tipple, or (2) for the same object, by force or violence, induced plaintiffs' employees concertedly to refuse to work for plaintiffs; and (3) was the result of such conduct by the Defendant, its officers, agents, representatives and *members*", did plaintiffs sustain damage to their business or property?

the other theories" and approving the rule that "If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." as found in Maryland use of *Markley v. Baldwin*, 112 U. S. 490, 493.

III.

Further emphasizing the Sixth Circuit's lack of concern for the necessity of proving union agency relates to its approval of the district court's permitting various coal operators (*ante*, p. 25) to testify concerning their having suffered property damages but without proof or identification of the tortfeasors.[28] The seriousness of this error lies in the formulation of a procedural pattern for imposing money judgments upon labor unions by permitting employer plaintiffs full freedom from their heretofore recognized burden of proving that a union, through its agents, committed acts condemned by Section 303. The pattern now creates a *'presumption of union responsibility"* if the illegal acts occur at a time and place where a union may be involved. It permits the concept of piling one guess or inference upon another, condemned in *U. S. v. Ross*, 92 U. S. 281, 283, where it is said: "They are inferences from inferences, presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible." Accord: *Wesson v. U. S.*, 8 Cir., 172 F. 2d 931; *NLRB* v. *Ray-Smith Transfer Co.*, 5 Cir., 193 F. 2d 142, 144.

The procedural pattern consists of four steps: *First Step:* The primary employer (plaintiffs herein) testify, to property damages during a strike period, and as herein,

[28]Without comment, the Sixth Circuit rejected UMW's contention that the evidence was improperly admitted except it pointed to its prior decisions in *Gilchrist*, *Flame*, and *Osborne* (*ante*, p. 26). However, the opinions therein do not deal with the type of proof under discussion.

without proof of the party or parties responsible therefor. *Second Step:* The primary employer (plaintiffs herein) introduce as witnesses other employers whose operations have been picketed, they too are permitted to relate that their property has been damaged; and they too are not required to identify the tortfeasors. In some instances, as herein, they admit they do not know who committed the acts (125a, 139a, 140a, 141a). *Third Step:* The trial court charges the jury, as in the instant case, that while such evidence "does not constitute direct proof", nevertheless "They may be considered as bearing upon whether or not there was a common plan in regard to the operations of this strike and the operation of the pickets" (348a). *Fourth Step:* The district court then charges the jury that union responsibility is not restricted to union agency but may be based upon conduct of union members—even though there has been no evidence of who committed the acts.

Long before the Wagner Act, this Court declared "The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees" (*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209), and in the Act's Section 13, Congress guarantees the right to strike except as the Act restricts that right. Yet, where, as in the instant case, the Sixth Circuit has approved the pattern by which union responsibility is imposed by permitting witnesses to testify of tortious conduct without identifying the actors and there is no evidence that the tortfeasors acted at the direction of identified agents, such pattern effectively destroys labor's right to strike, frustrates national labor policy as enunciated by Congress and poignantly proclaims that strike activity is at labor's economic peril.

The pattern herein may not be treated as isolated to the instant case. If permitted to stand, it serves as a standard of sufficient proof and proper procedure when-

ever a labor union finds itself a defendant in a labor dispute action. It is crucial even to UMW in other litigation now pending in the Sixth Circuit,[29] and it is involved too in another Sixth Circuit case in which the petition for certiorari is now being prepared.[30]

In non-labor cases the Sixth Circuit has denied the jury the right to guess (*Troutman v. Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F. 2d 769; *Gulf Refining Co. v. Mark C. Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425.) Its sanction herein is directly opposed by federal appellate courts in labor cases which deny to the National Labor Relations Board the right "of raising suspicion to the status fact or of basing inferences upon mere speculation". *NLRB v. Sun Shipbuilding etc. Co.*, 3 Cir., 135 F. 2d 15, 31; *Hazel Atlas Glass Co. v. NLRB*, 4 Cir., 127 F. 2d 109; *NLRB v. Goodyear Tire & Rubber Co.*, 5 Cir., 129 F. 2d 661, 664.

The preceding discussions have demonstrated the total lack of evidence to support the opinion's conclusion that the picketing was a secondary boycott violative of the Act's Section 303 and UMW responsibility and warrant for the jury awards either under Section 303 or the common-law claim. Heretofore, this Court has rejected jury verdicts which had the imprimatur of lower appellate courts when the records were so devoid of evidentiary support as to render them unconstitutional *under the due process clause*. *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157, 163. While these cases dealt with the deprivation of liberty, the Federal Constitution's Fifth Amendment likewise forbids the deprivation of "*property, without due process of law*".[30a] In the instant case, where the record is devoid of any evidence

[29] *R. P. Price et al., dba Elkhorn Coal Co. v. UMWA*, Case No. 15,046

[30] *White Oak Coal Co. v. UMWA*, 6 Cir., 318 F. 2d 591.

[30a] The Federal Constitution's Fifth Amendment reads in part that: "No person shall . . . be deprived of life, liberty or property, without due process of law, . . ."

to support the jury finding of UMW responsibility and the jury awards against UMW, the sanction thereof by the Sixth Circuit's opinion and judgment that Companies recover of UMW the money judgments aggregating $264,000 clearly deprives UMW of property without due process of law.

IV.

Local 761 highlights the difficulty which federal courts and the Board alike have had in interpreting Section 303, despite their expertise. There is no reason to think a jury of laymen would be less perplexed as to what is required to sustain a Section 303 violation. This emphasizes the vital necessity that a jury charge be given with clarity and precision and, particularly, should include those criteria which would afford a jury in an interrogatory submitted to it to determine the factual issues submitted. Neither the court's instructions nor the interrogatories did so.

In addition to the gross error contained in Interrogatory I which permitted the jury to find UMW responsible and to fix money damages against it for *members'* conduct without concern of union agency (discussed in Reasons II and III), in the Sixth Circuit, UMW complained the Court's Interrogatory 1 (upon which other interrogatories were based) was inconsistent with pleadings and without evidentiary basis; that it did not clearly apprise the jury of the law to be applied to the facts; that the trial court had committed reversible error in its charge concerning the elements of a Section 303 violation, an error which would have been eliminated had the court charged the jury according to UMW's proffered Instruction 3; and that the trial court had committed reversible error in refusing UMW's proffered Instructions 4 and 5.

The district court submitted for jury answer, Interroga-

tories 1 through 6 (367a).[1] UMW objections to Interrogatory No. 1 (upon which the other interrogatories were based) stated "*it does not correctly state the law concerning the violation of* the Statute or the evidence offered by the plaintiffs" (15a-16a, 337a, 349a).

First, we discuss the lack of evidence to support the Interrogatory, which posed the inquiry whether UMW's purpose in the activities at Companies' premises was to force or require "*Plaintiffs to join the Union.*" Since the jury gave an affirmative response, it is important to note this purpose, as posed in the interrogatory and so answered by the jury, *is wholly inconsistent with the complaint's allegations.*[2] Moreover, not a word in the record supports the Interrogatory's inquiry that UMW's purpose was to force or require either Ashlo or Sunfire's joining UMW.

It is well-settled an instruction on a proposition of law about which there is no evidence is clearly erroneous. *Evansville Container Corp. v. McDonald*, 6 Cir., 132 F. 2d 80, 85. Certainly the same result obtains where, as here, a jury has answered an interrogatory not supported by facts and judgment is entered upon the jury's response.

Secondly, since Companies claimed federal jurisdiction was based upon a violation of the Act's Section 303, UMW sought to have the jury instructed by its Instruction 3 (333a) that a violation thereof required a labor dispute

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[1] These Interrogatories are to be found in UMW's certified Supplemental Appendix record filed in this Court (367a).

[2] In the complaint's paragraphs 4 and 5, Companies alleged the objects to be:
"4. . . the objects of the union were to force plaintiffs to cease doing business with other employers, and to force such other employers to recognize or bargain with the Union as the representative of the employees of such other employers. . ." (4a); and
"5. . . the objects of the Union were to force and compel other employers and persons to cease doing business with plaintiffs, and to compel plaintiffs to recognize or bargain with the Union as the representative of plaintiffs' employees. . ." (5a).

between a primary employer and the union which, to win the dispute, pressured employees of a "*neutral employer* with whom it had no dispute" to refuse to handle the primary employer's products, and, the union's object must have been to force Companies to recognize or bargain with it as representatives of plaintiffs' employees or to force other coal producers and persons to quit doing business with Companies. This was consistent with this Court's *Local 1976*. Yet, the jury instructions are silent concerning the important factor of the *neutral employer*.

While the trial court instructed the jury the law recognized the right to strike and picket peacefully, in submitting Interrogatory 1 posing the question whether UMW induced or encouraged employees of coal-producing companies engaged in hauling or supplying coal to Companies' tipple to engage in a concerted refusal to transfer coal from their employers' mines to that tipple (339-40a), it failed to instruct either in the Interrogatory or in its instructions, as *Local 761* observes, that Section 303 "could not be literally construed" because to do so would ban primary activity (366 U. S. 672). Nor did the district court apprise the jury, as *Local 761* proclaimed, "*mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees*" (366 U. S. 682) or that to find a Section 303 violation. (366 U. S. 680). "*The key to the problem is found in the type of work that is being performed by those who use the separate gate*" and that " '*the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations*' " (366 U. S. 681).

UM's Instruction 4, refused (A. 21a), dealt with the right of primary picketing. One looks in vain to find in

the court's instructions any attempt to distinguish between primary and secondary activities—a critical omission! *Local 761* cautioned that the line between primary activity is not a "glaringly bright" one; and in demonstrating a Section 303 violation occurs only when the objective falls within one specifically banned thereby, this Court noted, "*The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade*" (366 U. S. 673), and "*picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object" in violation of Section 303* (366 U. S. 673). This Court emphasized the need for distinguishing between objects of picketing activity which falls within the ambit of conduct proscribed by that Section and those which do not. *This is precisely what the district court did not do!*

Moreover, *International Rice Milling Co.*, 341 U. S. 665, 672, holds violence is immaterial in a Section 303 charge, and UMW's Instruction 5 (335a) would have so advised the jury; but in addition to rejecting it (336a), the court's instructions emphasized the element of violence (A. 23-34a).

Interrogatory 1 is to be condemned, too, because it submitted to the jury a mixed question of law and fact. *Carpenter v. Baltimore & Ohio R. Co.*, 6 Cir., 109 F. 2d 375, 379; *Feldmann v. Conn. Mut. Life Insurance Co. of Hartford, Conn.*, 8 Cir., 142 F. 2d 628, 634; *Jackson v. King*, 5 Cir., 223 F. 2d 714, 718. Where, as here, the question is a mixed one of fact and law, and the district court failed to instruct the jury as to the legal standards properly to be applied, the interrogatory is offensive not only to the foregoing principle, but also to Rule 49's (Federal Rules) [A. 18a] requirement that the court shall give "such explanation or instruction" as may be needed to enable the jury competently to answer the interrogatories.

The Sixth Circuit does not deny UMW's contention that Interrogatory 1 submitted to the jury was wholly inconsistent with the allegations and was not supported by the facts. It incorrectly asserts (A. 5a) UMW did not state its grounds of objections to the Interrogatory. Objection was made it did not "correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs" (15a-16a, 337a, 349a). The opinion's indication that F. R. C. P., Rule 51's requirement is inflexible must be compared with *City of Knoxville v. Bailey*, 6 Cir., 222 F. 2d 520, 529, where exceptions to the trial court's refusal to give special requests sufficed to meet the Rule's requirements, and to *Solomon v. U. S.*, 6 Cir., 276 F. 2d 669, 674, where review was accorded although no objection was raised until the motion for a new trial. The opinion does not respond to UMW's contention that a jury answer to an interrogatory not supported by fact is erroneous.

Moore's Federal Practice—Rules and Official Forms, as Amended 1963, p. 925 recites: "Hence although no timely or proper objection was made, the court's error in instructing on a material issue may be the basis for grant of a new trial by the district court when it is apparent that a miscarriage of justice may otherwise occur."

Further, just as the opinion disregarded *Local 761's* principles in holding UMW violated Section 303, so the trial court ignores those principles and this Court's professions therein which would have guided the jury in its determinations. Yet, despite UMW complaint that the trial court's instructions lacked these essentials, and failed to denote the necessity that there be a neutral employer (which Instruction 3, refused, would have done) and to distinguish between primary and secondary picketing (encompassed in UMW's proffered Instruction 4, A. 21a), and

to apprise the jury that violence is immaterial in a Section 303 charge (which was encompassed in its proffered Instruction 5, refused), the opinion merely recites the trial court's charge to be "without prejudicial error" (A. 5a). The opinion does not refute UMW's contention the essentials of a Section 303 violation were not given to the jury; and *Thomas v. Union Ry. Co.*, 6 Cir., 216 F. 2d 18, proclaims that an erroneous instruction is presumptively prejudicial.

The Sixth Circuit erroneously states (A. 5a) no objections were made to the jury charge. In addition to objecting that the charge did not define the boycott in terms of the statute, UMW objected to the trial court's refusal to give its proffered Instructions (333- 36a, 337a, 348-9a). *Hasselbrink v. Speelman*, 6 Cir., 246 F. 2d 34, 39, made clear that where a point was called to the trial judge's attention so as to advise him as to the question of law involved, that sufficed against a contention that objections were not formally made. "A formal objection need not include detail of supporting argument in order to fully apprise the court of the grounds of the objection." *Darter v. Greiner*, 10 Cir., 301 F. 2d 772, 775. The Sixth Circuit relied upon *Palmer v. Hoffman*, 318 U. S. 109, 119 (A. 5a) but this Court's requirement therein that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error" (318 U. S. 119), UMW submits, is met by UMW's proffered instructions and its noted objections. This is consonant with this Court's declaration in *Sunkist Growers, Inc.* (370 U. S. 19, 26-7) that instructions and objections "must be viewed in context" and, noting that counsel had requested certain instructions, as herein, rejected the contention that objections to instructions had been waived.

In contrast to the opinion's disregard of UMW's con-

tentions and its failure to show any fallacy in UMW's argument on the interrogatory and the instructions (given and refused), is the Sixth Circuit's evidenced concern where the jury was incorrectly charged on material issues in *Bellak v. United Home Life Ins. Co.*, 6 Cir., 244 F. 2d 623; *Southern Ry. Co. v. Elliott*, 6 Cir., 250 F. 2d 740.

The foregoing discussion abundantly demonstrates the Sixth Circuit's error, as well as the need for guidance by this Court in jury trials concerning Section 303 violations.

Since the jury's answer to Interrogatory 1 encompassed both the alleged Section 303 violation and the common-law claim, the errors discussed in each of Reasons I through IV condemn the jury's verdict of UMW's responsibility and the money awards and the judgments based thereon.

V.

As noted (*ante*, p. 28), UMW challenged the district court's jurisdiction, power and authority to hear Sunfire's claim and to enter judgment in its favor, as they related both to Section 303 and Kentucky's common law. In the Sixth Circuit's *Osborne Mining Co.* case (279 F. 2d 716), that court, noting Love and Amos was a sales agency and Osborne's agent, and sold coal mined by Osborne, for which it was paid a commission, declared jurisdiction was lacking because Love and Amos "failed in their federal cause of action", not because of "lack of supporting evidence" but "because it never had and could not assert any federally recognized cause of action or ground of recovery" (279 F. 2d 729). There being no federal cause, the Sixth Circuit declared the district court, in *Osborne*, had no jurisdiction for violation of the Tennessee common law and ordered dismissal of Love and Amos' complaint. The Sixth Circuit herein distinguished the instant case from *Osborne* on the ground that "no such agency relationship is disclosed by the record" (A. 5a). That it erred in so holding is manifest from the undisputed evidence

(*ante*, p. 28) showing the agency relationship between Sunfire and Ashlo.

VI.

In the Sixth Circuit and the district court, UMW asserted there was no basis for jurisdiction to adjudicate any non-federal cause of action. While the Sixth Circuit's opinion does not discuss the jurisdictional question, discussed below, which was raised in the Sixth Circuit, it recites that "the remainder of the defendant's contentions, all of which have been resolved adversely to it, do not here require discussion, and it follows that the district court is affirmed" (A. 5a).

There is thus presented a federal question important in the construction and administration of the Act's Section 303, in that herein the Sixth Circuit has sanctioned a federal district court's assumption of jurisdiction, power and authority over a state common-law tort claim against an unincorporated labor union, even though diversity of citizenship of parties is lacking and even though the district court is sitting in a state in which the claim allegedly arose and which does not regard the unincorporated labor union as a jural entity and would not have permitted such an association to be sued in its state courts in its common name on such common-law tort claim.

Guaranty Trust Co. v. York, 326 U.S. 99, declared that "a federal court adjudicating a State-created right . . . is for that purpose, in effect, only another court of the State" and that "*it cannot afford recovery if the right to recover is made unavailable by the State*" (326 U. S. 108-9). Therein, this Court admonished that, "the accident of a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result" (326 U. S. 109). The Sixth Circuit's result herein is in direct conflict with this Court's foregoing professions.

a. In rejecting UMW's motion to dismiss the complaint the district court pointed to *UMWA v. Meadow Creek Coal Company, Inc.*, 6 Cir. 263 F. 2d 52, cert. den. 359 U. S. 1013, as its authority for rejecting dismissal. That case placed heavy reliance on *Hurn v. Oursler*, 289 U. S. 238, but such reliance is misplaced, since, as the following discussion shows, *Hurn*, as well as *Meadow Creek*, *UMWA v. Osborne Mining Co., Inc.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881, and *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert den. 368 U. S. 875, are inapplicable.

While *Hurn* permitted a federal court to deal with both a non-federal and a federal claim in the same case, to justify *Hurn's "judicial economy"* doctrine, this Court rationalized the federal and non-federal claims "so precisely rest upon *identical facts* as to be little more than *the equivalent of different epithets to characterize the same group of circumstances*" (289 U. S. 246).

If this be the basis for the district court's conclusion, then assertion of jurisdiction of the non-federal claim finds full challenge in the doctrine of federal preemption, for if the non-federal claim be supported only by evidence reflecting a violation of Section 303, then Congress would have occupied the field of the type of conduct involved in Section 303 and thereby would have foreclosed state court jurisdiction to entertain a common-law tort action for damages based thereon. The result thereof would be the district court had no jurisdiction to entertain a common-law tort claim for damages based upon the type of conduct involved in Section 303, since Congress provided a damage action remedy for conduct proscribed in that section.

In *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, this Court rejected

federal preemption because the Act "sets up no general compensatory procedure" for the activity found wrongful therein; but the "compensatory procedure" for activities herein claimed to be unlawful was provided by Congress in Section 303, and this the Court fully recognized in *Labarnum* when it observed "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts" (347 U. S. 665). Congress was not indifferent to the phase of damages resultant from conduct in violation of the Act's secondary boycott provisions, for, not only has union conduct as this case concerns been made subject to regulation by a federal agency, but there is express Congressional provision for a damage action remedy. In *Sherlock v. Alling*, 93 U. S. 99, 104, the Supreme Court stated that, "Whatever . . . Congress determines, either as to a regulation or the *liability for its infringement is exclusive of state authority.*"[1] Accord: *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173.

Since the doctrine of federal preemption is not discussed in *Meadow Creek, Osborne or Gilchrist*, their inapplicability to the instant case is obvious.

The legislative history of the Act's Section 303 records that as originally proposed and passed in the House of Representatives, federal district courts would have been vested with jurisdiction to try damage actions based upon causes of action involving virtually every type of inter-

[1] See also *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569, where it is stated that, "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirement than they can annul them."

ference arising in the course of a labor dispute."[20] In enacting Section 303, Congress was "concerned with reshaping labor-management legal relations",[21] but it rejected the extension of federal jurisdiction to the adjudication of labor dispute damage actions except insofar as that section "describes and condemns specific union conduct directed to specific objectives." *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U. S. 93, 99, wherein this Court declared that a "primary employer", such as plaintiffs in the case at bar, "with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences" of union activity "by means other than those proscribed" in Section 303.[22] In enacting Section 303 Congress created a new cause of action."

Thus, the district court's assertion of jurisdiction in the instant case upon an alleged violation of plaintiffs' rights under the common law obtaining in Kentucky achieves "that which Congress refused to enact into law", and, as this Court stated in *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355, 364, "cannot be sustained."

b. As already shown, in enacting Section 303 Congress

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[20] "Legislative History of the Labor Management Relations Act, 1947, Vol. I, p. 158, 204. Section 12 of H. R. 3020, as passed House, is copied in the Appendix hereto, p. 11-12a.

[21] International Longshoremen's etc. Union v. Juneau Spruce Corp., 342 U. S. 237, 241-2.

[22] While the Court was dealing in Local 1976 with Section 8(b)(4)(A) of the Act, since the proscriptions contained in Section 8(b)(4) parallel those forming the cause of action in Section 303, the Court's language is apposite in the case at bar. *Int. Bro. of Electrical Workers v. NLRB*, 341 U. S. 694; *United Brick Etc. Workers v. Deena Artware*, 6 Cir., 198 F. 2d 637, cert. den. 344 U. S. 897.

[23] In the debates concerning Section 303, inquiry was directed at Senator Taft as to whether "all the amendment would do, if adopted, would be to create a cause of action for damages . . . in a Federal court", to which Senator Taft replied, "That is correct". Legislative History of the Labor Management Relations Act, 1947, (Government Printing Ofc.), Vol. II, p. 1372.

created a new federal cause of action. Nothing therein contained, either expressly or impliedly, indicates Congress intended to vest federal district courts with jurisdiction to deal with state causes of action in the absence of diversity of citizenship required by Section 1332, Title 28, USCA."

The complaint itself (4a-7a) described UMW as a voluntary unincorporated labor organization, which in Kentucky, is not a jural person subject to suit. *Diamond Block Coal Co. v. UMWA*, 222 S. W. 1079 (Ky.); *Local Union No. 500 v. Wise*, 269 S. W. 2d 721 (Ky. 1954).[*] Hence, in the case at bar, UMW's citizenship must be determined by citizenship of its individual members. *Underwood v. Maloney*, 3 Cir., 256 F. 2d 334; *Lowry v. International Bro., etc.*, 5 Cir., 259 F. 2d 568; *Stein v. American Federation of Musicians*, DC Tenn., 1960, 183 F. Supp. 99; *Textile Workers Union of America v. Cone Mills Corp.*, DC, N. C., 1958, 166 F. Supp. 654, 657. Thus, where, as herein, some UMW members are citizens of Kentucky and Companies are likewise citizens thereof, the Kentucky decisions demonstrate the want of the trial court's jurisdiction as to the non-federal common-law cause of action and over UMW.

The Kentucky rule was employed by the District Court for the Western District of Kentucky in *Sanders v. International Ass'n. of Bridge, etc. Iron Workers*, DC, W.D., Ky., 1954, 120 F. Supp. 390, 392, and *Lyons v. Sanders*, DC, W.D., Ky., 1954, 120 F. Supp. 392, to reject federal court jurisdiction for lack of diversity of citizenship.

A contrary result would not only usurp jurisdiction in

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[*] See Appendix herein, p. 10-11a for 28 USCA 1332

[*] See also *Sweeney v. City of Louisville*, 309 Ky. 465, 218 S. W. 2d 4, where the Kentucky Court rejected an action brought against an association as such

conflict with 28 USCA 1332, which vests authority only where there is diversity of citizenship, but it would be also offensive to Rule 17 (b), Federal Rules of Civil Procedure, which subjects an unincorporated association to federal district court jurisdiction on a non-federal cause of action only if "the law of the state in which the district court is held" permits such an association to be sued.* Petitioner herein sought review by this Court of the same question in, *Flame Coal Co. v. UMWA*, 6 Cir., 303 F. 2d 39, and this Court denied certiorari (371 U. S. 891). Flame's reliance upon Rule 17(b), F.R.P.C., is fallacious since that Rule's language is only "for the purpose of *enforcing* for or against [an unincorporated association] *a substantive right existing under the Constitution or laws of the United States.*

Necessity of the trial court's adherence to Kentucky law is expressed by the Third Circuit in *Underwood v. Maloney, supra*, where it declared that "employment of the methods prescribed" by state rules "*is not permissive but is mandatory and exclusive*". (256 F. 2d 342). Since Kentucky would not have permitted a suit against UMW as an entity based upon a common-law cause of action, a crucial inquiry is how the trial court could have acquired even pendent or ancillary jurisdiction of the non-federal claim when Kentucky itself would not have permitted such suit against UMW. Both *Barlow v. Roche et al.*, D. C. Mun. Ct. of App., 1960, 161 A. 2d 58 [Appeal (Case No. 15,951) denied October 7, 1960, by the United States Court of Appeals for the District of Columbia Circuit] and *Benz v. Compania Naviera Hidalgo*, 9 Cir., 233 F. 2d 62 (1956) recognize the lack of jurisdiction in suits against unions in states adhering to the common-law rule.

In a diversity case, it was held that what a plaintiff

* Rule 17(b), Federal Rules of Civil Procedure, appears in the Appendix to this brief, p. 11a.

could not do directly "could not be done for him indirectly." *McPherson v. Hoffman*, 6 Cir., 275 F. 2d 466, 470. Since Kentucky's policy is not to regard an unincorporated association as a jural being, it is difficult to understand how that which does not legally exist and is legally not *in esse* could be said to commit an act which would serve as a basis for a cause of action or be an existing entity for purposes of a money judgment against it.

Further, as to the non-federal claim, the district court had no jurisdiction over UMW. It is thus clear that the district court erred in its failure to dismiss the action as to the state common-law action.

c. Moreover, the impropriety of employing *Hurn* to sustain the district court's nonfederal claim of jurisdiction is shown by the Reviser's Notes to the Judicial Code, 28 USCA, in connection with Section 1338 thereof. As revised, that section expressly grants jurisdiction of a "claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws", and the Reviser explains that joinder "is intended to avoid 'piecemeal' litigation" and that such revision would enact "as statutory authority" the *Hurn* doctrine.*

Specific reference by the Reviser to the *Hurn* doctrine in its relation to Section 1338, and its absence in the other jurisdictional sections of the Judicial Code, demonstrate clearly that applicability of the *Hurn* doctrine which would permit joinder of a non-federal claim was restricted to Section 1338 cases. Such indicated restriction, coupled with Congressional failure expressly to provide for like joinder in instances arising under Section

* Cited also is *Musher Foundation v. Alba Trading Co.*, 2 Cir., 127 F. 2d 9 (1942). See Reviser's Note 28 USCA 1338, p. 66.

303, fully sustain UMW's assertion that *Hurn* and kindred cases have no applicability to Section 303 claims.[42]

Totally challenging the district court's decision that it had jurisdiction of a state claim, the Fourth Circuit, in *UMWA v. Patton*, 211 F. 2d 742, cert. den. 348 U. S. 824, rejected a contention that in a Section 303 cause of action a federal court was nevertheless warranted in awarding punitive damages for a common-law tort of interference on the theory that *Hurn* permitted the allowance of such damages.[43]

The Sixth Circuit's sanction herein of the district court's unwarranted assumption of jurisdiction invites this Court's review. This precise question has not, but in the public interest, should be determined by this Court.

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[42]Fortifying UMW's position is the following statement from an article "The Proposed Revision of the Federal Judicial Code", 60 Harvard Law Review 424-437, where (at p. 431) it is said:

"In restricting the scope of the provision concerning joinder of non-federal question to patents, copyright, and trademark cases, the proponents of the bill have failed to take advantage of an opportunity to resolve the larger question of such joinder as applied to all types of cases involving original jurisdiction."

[43]In *Patton*, plaintiffs asserted, in their Fourth Circuit brief (p. 34) that "The evidence is such to establish not only secondary boycott as made unlawful by the Taft-Hartley law, but also the common law tort of interference with the contract right. . . . In such a case where the federal question, to-wit: the secondary boycott under the Taft-Hartley Act, is not plainly wanting in substance, the federal court, . . . may nevertheless retain and dispose of the case upon the non-federal ground", citing *Hurn*. This contention appears too in *Patton* as reported in 47 ALR 2d 850, 855.

CONCLUSION.

For the foregoing reasons, Petitioner prays that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 14832

United States Court of Appeals

FOR THE SIXTH CIRCUIT

SUNFIRE COAL COMPANY, a corporation, and ASHLO COAL COMPANY, a corporation,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Kentucky—Jackson Division.

Decided February 16, 1963.

Before: WEICK and O'SULLIVAN, Circuit Judges, and PECK, District Judge.

PECK, District Judge. On April 25, 1959, a coal tipple at Combs, Perry County, Kentucky, owned by one of the plaintiff corporations and operated by the other, burned. Thereafter, plaintiffs instituted this action to recover damages allegedly occasioned by such burning, and after jury trial and verdict judgment was entered in favor of the plaintiff Sunfire Coal Company, the owner and lessor of the premises in question, in the amount of $250,000 against the defendant, and in favor of the Ashlo Coal Company, the lessee and operator, in the sum of $14,000, also against this defendant. From that judgment, and from the trial

court's order denying its motion for a new trial, defendant has perfected this appeal.

The burning of the coal tipple climaxed a period of intense labor unrest which had endured nearly a month and a half. The record discloses that during that time contract negotiations were in progress between District 30, United Mine Workers of America, and at least some of 176 coal operators in the vicinity to whom sixty-day notices terminating a prior agreement had been sent on January 7, 1959; plaintiffs, not having been parties to the prior agreement, did not receive such a notice, which also contained an offer to negotiate a new contract. Picketing at the subject premises (hereinafter referred to as the Ashlo tipple) commenced March 16th and continued until the date of the fire, and the unrest referred to included the operation of a motorcade throughout the area for three days; this motorcade was varyingly described as containing from seventy-five to three hundred cars at different times, and its ostensible purpose was to determine which of the mines in the area were operating. The Kentucky State Police were in constant contact with the situation, arrested one individual for attempting to incite a riot, and in general maintained a vigilant surveillance of the area. Most of the 57 witnesses who testified contributed bits of testimony of tacks strewn on the road, of truck tailgates opened to let coal fall to the highway, of boisterous and unruly conduct, of spasmodic shooting and dynamiting, of bullets shot into a coal truck, of knife-slashed tires, of dirty name calling and personal threats, all combining to create a picture of general disturbance and disquiet throughout the community.

On April 24, 1959, there were a dozen state troopers at Combs and one of them testified that on that day the pickets on the road near the Ashlo tipple "continued to come in, there were so many of them, they were out of hand . . . they were just falling in there in carloads." In the course of the day, an attempt by defendant's representatives to get the coal company to execute a contract was unsuccessful.

Shortly after 6 o'clock a. m. the following day the Ashlo tipple burned. During the night, water tanks on the premises had been drained, and the destruction was extensive. Estimates of the number of pickets at the scene the preceding day ran as high as one thousand, and the disturbance continued throughout the night, the testimony indicating that there was considerable shooting toward the tipple, some of which came from the direction of the pickets. A state trooper who saw the fire start testified that a man ran from the tipple less than fifteen minutes earlier, and tracking by bloodhounds disclosed a place at which one or more persons had been sitting, from which such persons were tracked some miles to a point where they apparently got into an automobile. The record discloses no positive evidence of the origin or of the originators of the fire, but there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant.

The Complaint herein was filed under the provisions of Section 303 of the Labor Management Relations Act of 1947, as amended by Public Law 86-257, 1959, and defendant first contends that no damage to plaintiffs' property and business within the meaning of that Section has been alleged or proven. Since permissive primary picketing at the Ashlo tipple would have been legitimate, it becomes necessary to examine the character of this activity.

The evidence was that neither Sunfire nor Ashlo produced coal, but that the latter bought the coal at the tipple from numerous independent producers who caused it to be brought there by truck. To the extent that such producers had not signed agreements with it, defendant was essentially engaged in negotiation or conflict with them. Faced with the complexity of numerous picketings at separated and inaccessible mine locations, defendant chose the simpler course of closing the outlet provided for the numerous producers by Ashlo's operation of Sunfire's tipple. In reaching this conclusion we specifically reject defendant's contention

that Ashlo employees were themselves picketing for higher wages. The pattern of defendant's strategy in attempting to obtain contracts with the 176 producers by concentrating efforts on the smaller number of outlet operators is further indicated by defendant's attempt to obtain contracts with the latter which would permit them to purchase coal only from producers under contract with defendant. It is our conclusion that under the circumstances here present the picketing at the Ashlo tipple was not merely permissive primary picketing, but was a secondary boycott within the meaning of Section 303 of the Labor Management Relations Act. See *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (6 C. A., 1961), cert. den. 368 U. S. 875, and *Flame Coal Company v. United Mine Workers of America*, 303 F. 2d 39 (6 C. A., 1962), cert. den. 371 U. S. 891.

Defendant has undertaken a detailed review of the evidence in support of its argument that the evidence does not support the jury's verdict as to its responsibility for the burning of the tipple. Without here reviewing the evidence except to the extent that it is above summarized, suffice it to say that no justification appears for disturbing the judgment of the trial court or its order denying defendant's motion for a new trial on numerous grounds, including this one.

The defendant further assigns as reversible error the action of the court in admitting, over its objection, evidence in various categories. Under authority of the two cases above cited and *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (6 C. A., 1960), cert. den. 364 U. S. 881, evidence concerning dynamiting at plaintiffs' premises, with respect to incidents at mines and properties other than those of the plaintiffs and with reference to property damage sustained by other coal operators was properly received. The court, similarly, properly overruled an objection to the testimony of a state trooper to the effect that he stopped a car containing two

union members and a large amount of ammunition, since the jury had a right to consider this evidence in determining whether there was a concert of action between the two individuals. Whether or not the defendant and United Mine Workers of America Welfare and Retirement Fund are separate entities, evidence that the latter had paid medical bills charged to an individual was properly received on the issue of his relationship with the defendant.

While we feel that the charge of the trial court to the jury was without prejudicial error, on the present record it is unnecessary to pass upon that question, or to consider the propriety of the trial court's rulings on interrogatory 1 and its refusal to give certain instructions requested by defendant. Rule 51, F. R. Civ. P., precludes a party from assigning as error the giving or failure to give an instruction to the jury unless he has objected thereto before the jury retired to consider its verdict, "stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis supplied.) Not having stated such grounds, defendant may not now be heard to complain. *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483 (1943); *McPherson v. Hoffman*, 275 F. 2d 466 (6 C. A., 1960). In a case where one entity acted merely as sales agent for another, it was held that the principal was without a federally recognized cause of action in *United Mine Workers of America v. Osborne Mining Company*, supra. Defendant relies on that case in arguing that as Ashlo's principal agent Sunfire cannot be awarded judgment. This argument is completely untenable because no such agency relationship is disclosed by the record.

The remainder of the defendant's contentions, all of which have been resolved adversely to it, do not here require discussion, and it follows that the judgment of the district court is affirmed.

APPENDIX B

Filed June 7, 1961

Judgment

In accord with the answers of the Jury to interrogatories submitted by the Court upon the conclusion of the trial of this action,

It is the judgment of the Court that the plaintiff Sunfire Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Two Hundred Fifty Thousand ($250,000) Dollars, and its costs herein, and

It is the further judgment of the Court that the plaintiff, Ashlo Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Fourteen Thousand ($14,000) Dollars, and its costs herein.

This 7th day of June, 1961.

H. CHURCH FORD, *Judge*

Filed June 28, 1961

Order

Pursuant to a previous assignment the motion of the defendant for a judgment, or in the alternative for a new trial, having been brought on for hearing on Friday, June 23, 1961, and the Court having heard the argument of counsel for the parties, and having considered said motions, and being advised

IT IS ORDERED that the defendant's motion for judgment, and its alternative motion for a new trial, both be, and the same are denied.

This 27th day of June, 1961.

H. CHURCH FORD, *Judge*

Filed February 16, 1963

Judgment

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ JOHN W. PECK,
United States District Judge
(Sitting by designation)

Filed June 10, 1963

Order

Upon consideration,

IT IS ORDERED that the petition for rehearing be denied.

Approved for entry:

/s/ JOHN W. PECK,
United States District Judge
(Sitting by designation)